SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1477

CHICAGO JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,

Petitioner,

vs.

CHICAGO TRIBUNE COMPANY, CHICAGO AMERICAN PUBLISHING COMPANY AND FIELD ENTERPRISES, INC.,

Respondents.

BRIEF OF CHICAGO TRIBUNE COMPANY AND CHICAGO AMERICAN PUBLISHING COMPANY IN OPPOSITION TO CERTIORARI.

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We, on behalf of the respondents Chicago Tribune Company and Chicago American Publishing Company, respectfully submit that the petition for writ of certiorari is without merit and should be denied.

QUESTION PRESENTED.

This case does not raise the "Questions Presented" framed in the petition (p. 3). Rather, the sole question presented is whether the respondent privately owned news-

papers may be federally compelled—on the ground that they are engaged in "state action"—to publish a particular advertisement that the newspapers believe is in violation of their established standards against publication of unfair, misleading, deceptive or discriminatory advertising.

STATEMENT OF THE CASE.

Petitioner's Statement is misleading and incomplete. We restate:

The petitioner is a Chicago clothing and garment workers union that vehemently opposes importation and sale of foreign-made clothing in the United States; petitioner believes that foreign competition threatens to reduce the number of jobs for its members. Imported clothing is sold in a multitude of retail stores, both small and large, throughout the Chicago area. However, the petitioner union singled out one specific retailer, Marshall Field & Co., to be the target of its attack against imported clothing. All union members were urged not to buy from Marshall Field, and picket lines were placed around the store to discourage shoppers from entering and buying foreign-made garments. (Appendix in Court of Appeals for the Seventh Circuit 26; hereafter cited as C. A. App.)

Then, in an apparent effort to intensify its campaign, the petitioner tendered a proposed full-page advertisement to the respondents' newspapers in Chicago; the ad (reproduced in the appendix to the petition, p. 1A) graphically publicizes the union's picketing of Marshall Field and urges the shopping public not to buy imported clothing at that store.

When the proposed ad was submitted to the *Chicago Tribune* and *Chicago Today*, it was referred to Mr. Charles Jordan, Manager of the General Advertising Department

for both newspapers.[1] Jordan reviewed the ad and evaluated it against the promulgated standards set forth in "The Chicago Tribune Advertising Acceptability Guide". (C. A. App. 29-37.) The Advertising Acceptability Guide contains detailed criteria designed to assure that submitted ad copy is free from "misleading, inaccurate, fraudulent, doubtful, or ambiguous representation, as well as dishonest or unfair competitive statements." (C. A. App. 35-36.) The Guide provides in part:

> "3. The Tribune does not accept advertising which, in its judgment . . . reflects unfavorably on competitive organizations, institutions or merchandise.
>
> * * * * *
>
> "5. The Tribune does not accept advertising which, in its judgment, might destroy the confidence of readers or advertisers. This includes advertising which is misleading, deceptive, or fraudulent, or which grossly exaggerates, or makes unwarranted claims.
>
> * * * * *
>
> "8. The Chicago Tribune reserves the right to reject any advertising which in its opinion, is unacceptable." (C. A. App. 36-37.)

Jordan in his best judgment decided that the petitioner's proposed ad was contrary to the Guide's standards and was therefore unacceptable for publication (C. A. App. 31). He concluded the ad was "unfair and would be misleading" in that it "singles out one retailer in Chicago as selling foreign-made merchandise and urges readers not to buy such merchandise from this retailer. [He] was aware that many competing retailers also sell similar foreign-made merchandise." (C. A. App. 31.)

Jordan did not confer or consult with anyone either

1. The General Advertising Department is responsible for clearing and accepting general advertising (*i.e.*, other than classified or retail advertising) for the *Tribune* and *Today* (C. A. App. 30, 40). The newspapers have a common corporate ownership.

within or without the newspaper in making his determination that the ad was unacceptable and should not be printed as submitted. Rather, as Jordan has testified, he read the ad "thoroughly" and, "based on our Acceptability Guide, . . . I determined in my judgment—I stress it was my judgment alone—to reject this ad." (C. A. App. 42.)

The petitioner chose not to revise, modify or resubmit its proposed advertisement; petitioner instead filed this suit in the U. S. District Court in Chicago, demanding that the Court compel the newspapers to print the ad as tendered. The District Court granted summary judgment in favor of respondents (307 F. Supp. 422) and the Seventh Circuit affirmed the judgment on appeal. (435 F. 2d 470.) Petitioner now seeks certiorari.

REASONS FOR DENYING THE WRIT.

We submit the petition is frivolous and should be denied.

Neither the petitioner's viewpoints concerning imported clothing, nor the right to express or advertise such viewpoints, is at issue in this case. Petitioner has arbitrarily chosen in its ad to single out and attack *one* retailer that sells imported clothing in the Chicago area, although scores if not hundreds of others are also doing so. The *Chicago Tribune* and *Chicago Today* declined petitioner's ad in its tendered form, believing that it violated the papers' announced standards against unfair, misleading and discriminatory advertising. The petitioner, without even once attempting to revise and resubmit the ad in accordance with respondents' advertising standards, brought this suit as an apparent test case of the right to compel newspapers to print any and all proffered advertising.

The lower courts properly rejected petitioner's test case, and we submit the result is not worthy of this Court's review.

I. NEWSPAPERS ARE NOT ENGAGED IN STATE ACTION.

Petitioner's attempt to force newspapers to publish advertising is not a case of first impression. Quite the contrary, numerous such suits have been filed, usually grounded on a claim that newspapers are "public utilities" or are "affected with the public interest." The claim has been uniformly rejected because newspapers are private business enterprises operated at the discretion and control of their own management. *E.g., Approved Personnel, Inc.* v. *Tribune Company,* 177 So. 2d 704 (Fla. App. 1965); *J. J. Gordon, Inc.* v. *Worcester Telegram Publishing Co.,* 177 N. E. 2d 586 (Mass. 1961); *Shuck* v. *Carroll Daily Herald,* 247 N. W. 813 (Iowa 1933); *Friedenberg* v. *Times Pub. Co.,* 127 So. 345 (La. 1930); *Lord* v. *Winchester Star, Inc.,* 190 N. E. 2d 875 (Mass. 1963), *appeal dismissed,* 376 U. S. 221 (1964); *Poughkeepsie Buying Service, Inc.* v. *Poughkeepsie Newspapers, Inc.,* 131 N. Y. S. 2d 515 (Sup. Ct. 1954); *Camp-of-the-Pines, Inc.* v. *New York Times Co.,* 53 N. Y. S. 2d 475 (Sup. Ct. 1945); *Wall* v. *World Pub. Co.,* 263 P. 2d 1010 (Okla. 1953); *Mid-West Electric Coop.* v. *West Texas Chamber of Commerce,* 369 S. W. 2d 842 (Tex. Civ. App. 1963); *Bloss* v. *Federated Publications, Inc.,* 157 N. W. 2d 241 (Mich. 1968), *affirming,* 145 N. W. 2d 800 (Mich. App. 1966). These cases have traditionally been instituted in state courts and have been decided on the basis of state or common law principles, rather than federal grounds.

The petitioner, seeking to avoid the fatal impact of the established law in the field, has attempted to assert a federal claim by suing under the Civil Rights Act (42 U. S. C. § 1983); petitioner argues that respondent newspapers are engaged or involved in "state action" and have deprived petitioner of its First Amendment rights by not accepting the advertisement attacking Marshall Field. The

contention is as fallacious as it is novel and was properly rejected below; there is no warrant for still another review here.

The cases cited in the petition are totally distinguishable and inapposite, as the opinion of the Court of Appeals demonstrates. None of the petitioner's state action cases involved newspapers; the defendants in petitioner's cases were held to be engaged in state action because they were performing clearly governmental or public functions. *Marsh* v. *Alabama*, 326 U. S. 501 (1946) (company town); *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308 (1968) (urban shopping center); *Terry* v. *Adams*, 345 U. S. 461 (1953) (political party); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961) (public dining concession inside governmental parking facility).[2]

The printing and publishing of newspapers is in fact the antithesis of state action; newspapers in this country are constitutionally free to print or not print without governmental dictation or interference. Indeed, we submit that the separation and independence of newspapers from government is the touchstone of First Amendment freedom of the press. See, *e.g.*, *Near* v. *Minnesota*, 283 U. S. 697 (1931).

Clearly, none of the factors relied on by petitioner to find "state action" (such as publication of legal notices and municipal regulation of newsstands) can remotely support or justify the drastic result sought by petitioner in this suit, *i.e.*, a court order commanding a newspaper to print material it believes to be deceptive, unfair and discriminatory. The ultimate effect of such a holding is manifest;

2. Other cases cited in the petition are equally dissimilar and irrelevant. *E.g.*, *Associated Press* v. *United States*, 326 U. S. 1 (1945) (holding that newspapers are not exempt from the antitrust laws); *Wirta* v. *Alameda-Contra Costa Transit Authority*, 68 Cal. 2d 51, 434 P. 2d 982 (Cal. 1967) (holding that a public transit system is engaged in state action).

federal judges would become editors and advertising managers of newspapers.

II. THERE IS NO CONFLICT OF DECISIONS OR OTHER REASON TO GRANT THE WRIT.

Petitioner does not and cannot claim that there is a conflict among circuits; indeed, as the petition itself recognizes (at p. 9), only one other case has involved a claim that newspapers can be forced to publish advertising because they are engaged in "state action" and the result was exactly the same as in the instant case. *Resident Participation of Denver, Inc.* v. *Love,* ..... F. Supp. ..... (D. Colo. 1971).

Nor can the petitioner claim that there is any other reason or occasion for exercise of the certiorari jurisdiction. If it is ever determined that this Court should seriously consider whether newspapers can be judicially compelled to accept advertising, we submit it should not be in a case such as this. The petitioner's advertisement was rejected because it singled out and attacked one retailer of imported clothing, and was thus found to violate the newspapers' established standards against printing unfair, deceptive or discriminatory advertising.

The petitioner, if it had wished to do so, could easily have tendered an advertisement expressing its views against imported clothing without unjustly and unfairly aiming its attack against one retailer. Clearly, the petitioner's suit was brought solely in the hope of its becoming a celebrated test case and we submit it does not deserve this Court's consideration. We respectfully suggest that exercise of this Court's certiorari review is and should be reserved for those compelled to litigate to obtain redress; the writ is not a vehicle for seeking to change the established law and find a new federal right when other avenues or solutions are available.

CONCLUSION.

For the foregoing reasons, we submit that the petition should be denied.

Respectfully submitted,

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